

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:TL-N-5533-00

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date:

to: Chief, Examination Division, Southern California District
Attention: [REDACTED], CEP Case Manager
[REDACTED], CEP Team Coordinator
CE: [REDACTED], Santa Ana

Audie Sturla, Group Manager, Employment Tax
Tony Lloren, Employment Tax Specialist
FE: 1417, Santa Ana

from: June Y. Bass, Associate Area Counsel, LMSB
Joyce M. Marr, Attorney
Jenny A. Moon, Attorney

subject: Request for Pre-Review of Non-docketed Significant Advice
Taxpayers: (1) [REDACTED] (EIN [REDACTED]),
(2) [REDACTED] (EIN [REDACTED])

Issue: Executing Forms SS-10 and Forms 4016 for years prior to
[REDACTED]
Statute of Limitations: [REDACTED]

THIS ADVICE CONSTITUTES RETURN INFORMATION SUBJECT TO I.R.C. § 6103.
THIS ADVICE CONTAINS CONFIDENTIAL INFORMATION SUBJECT TO ATTORNEY-
CLIENT AND DELIBERATIVE PROCESS PRIVILEGES AND IF PREPARED IN
CONTEMPLATION OF LITIGATION, SUBJECT TO THE ATTORNEY WORK PRODUCT
PRIVILEGE. ACCORDINGLY, THE EXAMINATION OR APPEALS RECIPIENT OF THIS
DOCUMENT MAY PROVIDE IT ONLY TO THOSE PERSONS WHOSE OFFICIAL TAX
ADMINISTRATION DUTIES WITH RESPECT TO THIS CASE REQUIRE SUCH
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THIS ADVICE IS NOT BINDING ON EXAMINATION OR APPEALS AND IS NOT A
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RESOLVE SERVICE POSITION ON AN ISSUE OR PROVIDE THE BASIS FOR CLOSING
A CASE. THE DETERMINATION OF THE SERVICE IN THE CASE IS TO BE MADE
THROUGH THE EXERCISE OF THE INDEPENDENT JUDGMENT OF THE OFFICE WITH
JURISDICTION OVER THE CASE.

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The purpose of this memorandum is to advise you in securing Forms SS-10, "Consent to Extend the Time to Assess Employment Taxes," and Forms 4016, "Consent Fixing Period of Limitation Upon Assessment of Employment or Miscellaneous Excise Taxes Against a Transferee," with respect to the following two entities:

1. [REDACTED] (EIN [REDACTED]), and
2. [REDACTED] (EIN [REDACTED])

Given the imminent expiration of the statute of limitations, we have assumed in rendering this memorandum that the statute of limitations for the assessment of employment taxes with respect to the foregoing entities has been validly extended through [REDACTED]. Furthermore, our advice herein is applicable for tax years prior to (but not including) the [REDACTED] year.

ISSUES

For each of the following entities, (a) how should the entity's name be captioned on the Form SS-10, and (b) whether a transferee consent, Form 4016, should be obtained:

1. [REDACTED] (EIN [REDACTED]), and
2. [REDACTED] (EIN [REDACTED])

CONCLUSIONS

1. [REDACTED]

a. Since you have not provided us with any facts to indicate that this entity was sold, liquidated, reorganized, or merged, we assume no such change, in which case you should secure a Form SS-10 from this entity, captioned as follows: "[REDACTED] (EIN [REDACTED])."

b. Assuming the foregoing, there is no "transferee" from whom a Form 4016 could be obtained.

2. [REDACTED]

a. We note that our advice with respect to this entity is based on incomplete facts (primarily relying upon LEXIS records and [REDACTED] transcripts) and significant assumptions regarding the purported merger of this entity into [REDACTED] ("[REDACTED]"). If you determine that any of our assumptions are incorrect, or that there are additional facts, you should not rely on our advice.

Keeping in mind the foregoing, we recommend that you obtain two Forms SS-10, captioned as follows:

i. [REDACTED] (EIN [REDACTED]) as successor in interest to [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]); and

ii. [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED]).

b. Given that you have not provided us with the merger documents pursuant to which [REDACTED] purportedly was merged into [REDACTED] we do not know whether [REDACTED] is a transferee at law.

However, assuming the facts most favorable to the Service, and as a precautionary measure, we recommend that you obtain a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED] for the relevant years prior to [REDACTED].

In the space labeled "(Name)", you should insert:
"[REDACTED] (EIN [REDACTED])."

On the line following the words "imposed against, or due from," you should insert: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])".

The Forms SS-10 and 4016 may be signed by a duly authorized officer of the respective entity, or an agent or attorney of such entity who is specifically authorized to execute the form by a power of attorney. Please double check all EINs and current addresses.

FACTS

1. [REDACTED]

[REDACTED], a Texas corporation, was listed on the rider attached to the Form SS-10 currently in effect for [REDACTED], and was listed on the Form 851, "Affiliations Schedule," attached to [REDACTED]'s income tax return for tax year ended December 31, [REDACTED].

You have not provided us with any facts to indicate that this entity was sold, liquidated, reorganized, or merged. As of [REDACTED], the organizational chart (previously attached as Exhibit H to our [REDACTED] memorandum) shows that this

entity existed as a wholly-owned subsidiary of [REDACTED] (" [REDACTED]"), an Indiana corporation. Furthermore, a LEXIS record for this entity, attached hereto as Exhibit A, shows its corporate status as "active."

An [REDACTED] transcript for this entity, attached hereto as Exhibit B, does not indicate any prior names.¹

2. [REDACTED]

[REDACTED], a Washington corporation, was listed on the rider attached to the Form SS-10 currently in effect for [REDACTED], and was listed on the Form 851, "Affiliations Schedule," attached to [REDACTED]'s income tax return for tax year ended December 31, [REDACTED].

You have represented to us that [REDACTED] was merged into [REDACTED] (EIN [REDACTED]), a California corporation, but have not provided us with any documents to this effect.

As of [REDACTED], the organizational chart (previously provided as Exhibit H) shows that [REDACTED] and [REDACTED] were wholly-owned subsidiaries of [REDACTED].

An [REDACTED] transcript for [REDACTED] (attached hereto as Exhibit C) shows [REDACTED]'s prior names as "[REDACTED]" and "[REDACTED]". Also attached as Exhibit D is an [REDACTED] transcript for [REDACTED].

LEXIS records, attached hereto as Exhibit E, show [REDACTED]'s corporate status as "inactive," not "merged out," although it also seems to indicate a merger between [REDACTED] and [REDACTED] on [REDACTED].

DISCUSSION

I. Generally

As we noted in our prior memorandum, dated December 5, 2000, when state law so provides, the successor in interest is primarily liable for the debts and obligations of the absorbed corporation. Phillips v. Lyman H. Howe Films Co., 33 F.2d 891,

¹ Even though LEXIS shows multiple "assumed names" for this entity, because these names are not reflected on the [REDACTED] transcript, we recommend that you do not take these names into account in the captioning of the taxpayer's name, unless you know for certain that the taxpayer is using the assumed names.

892 (3d Cir. 1929).

The party that is liable for the debts of the merged corporation is the one that must sign the waiver of the statute of limitations on behalf of the merged corporation. See Gott v. Live Poultry Transit Co., 17 Del. Ch. 288, 153 Atl. 801 (1931). When state law provides for primary liability of a surviving corporation after a statutory merger, the surviving corporation should sign the consent to extend the statute of limitations as "surviving corporation, successor in interest to predecessor corporation." Primary Liability and Transferee Liability of Successor Corporation, G.C.M. 34,970, I-4092 (July 31, 1972).

With respect to transferee liability, as we noted in our prior memorandum, dated December 8, 2000, the Service will attempt to assert that a successor is a transferee, as a last resort, when the statute of limitations under I.R.C. § 6501 has expired but the statute of limitations under I.R.C. § 6901 is still open. See GCM 34,970, at page 18, and CCDM 35.10.6.1 ("should the issuance of a new statutory notice be barred by the statute of limitations, it is advisable that the case be processed and handled as a transferee case").

Section 6901 does not create or define the existence of a transferee's liability, but affords the Commissioner a procedural remedy for collection of tax. Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part without published opinion and dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Gumm v. Commissioner, 93 T.C. 475, 479 (1989). Under I.R.C. § 6901(a)(2), assertion of transferee liability for employment taxes is allowed if the transferee liability arose on the liquidation of a partnership or corporation, or on a reorganization within the meaning of I.R.C. § 368(a).

II. Application of the Law

A. [REDACTED]

Because you have not presented us with facts to the contrary, we assume that this entity currently exists and was not subject to any mergers, liquidations, dissolutions, reorganizations, or sale. Consequently, you should secure a Form SS-10 captioned as, "[REDACTED] (EIN [REDACTED])."

Furthermore, assuming the foregoing, there is no "transferee" from whom a Form 4016 could be obtained.

B. [REDACTED]

1. Form SS-10

Without reviewing the documents pursuant to which [REDACTED] purportedly merged into [REDACTED], it is difficult to advise you on the proper captioning of the taxpayer's name. Our advice herein is based on incomplete facts, from reviewing [REDACTED] transcripts and LEXIS records.

Based on your representations, assuming that: (a) [REDACTED] was merged into [REDACTED], (b) [REDACTED] is the surviving corporation, and (c) the merger documents and the state law which governed the merger provided for the assumption by the surviving corporation of the merged corporation's liabilities, the Form SS-10 should be captioned as: "[REDACTED] (EIN [REDACTED]) as successor in interest to [REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])".

However, in the event that [REDACTED] was not merged, we recommend that you obtain a Form SS-10 from [REDACTED], captioned as follows: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])".

2. Form 4016

Without reviewing the merger documents, we can not determine whether [REDACTED] is a transferee at law. However, assuming the facts most favorable to the Service, and as a precautionary measure, we recommend that you obtain a Form 4016 from [REDACTED] for the employment tax liabilities of [REDACTED] for the relevant years prior to [REDACTED].

If you have any questions, please contact Jenny A. Moon at 949-360-3431 or Joyce M. Marr at 949-360-2688.

Attachments:

Exhibit A: A LEXIS record for [REDACTED]

Exhibit B: An [REDACTED] transcript for [REDACTED]

Exhibit C: An [REDACTED] transcript for [REDACTED].

Exhibit D: An [REDACTED] transcript for [REDACTED].

Exhibit E: LEXIS records for [REDACTED].